Memor. Rob. Dundas of Arnistoun roger
Lo. Woodhall

[This concerns a Bill of Advocation, herewith given in.]

January 17. 1759.

MEMORIAL for *Robert Dundas* of *Arniſton*, Eſq; Lord Advocate, *Margaret* Lady *Blantyre*, Dame *Margaret Hamilton*, Lady *Jean* and *Margaret Leſlies*, Mr *John Swinton junior*, Advocate, and others, the Proprietors or Inhabitants of Houſes within or near *Carrubber*'s Cloſe, Sufferers, or who were in imminent Danger of ſuffering by the late Fire.

THE Lord Ordinary's Interlocutor upon the Bill of Advocation herewith given in, hath "appointed both "Parties to prepare and make out Memorials in this "Cauſe, and to put them in the Lords Boxes;" with a View, no doubt, that the Court may conſider with Attention, a Queſtion which imports in a high Degree every Inhabitant of this City. In purſuance of that Interlocutor, this Memorial is humbly offered upon behalf of the Complainers.

The Queſtions that ſeem to ariſe upon the Bill of Advocation are two.

1*ſt*, Whether the Magiſtrates and the Dean of Guild have a Power, in Caſes of great Danger from Fire, to limit Tradeſmen and Artificers in the Manner of building their Work-houſes, or in the Uſe to which theſe Work-houſes are put, when built?

2*dly*, Whether there is not to be apprehended, from allowing Mr *Reoch* to build a Work-houſe, and keep a Kiln, in the Form, and to make uſe of it in the Manner of the laſt, ſuch Danger from Fire to the Memorialiſts, and, by Conſequence, to the whole City, as does ſufficiently require and warrant the Dean of Guild and his Council to interpoſe and prevent ſuch Danger?

Theſe ſeem to be the material Queſtions. And, with regard

71

to the *firſt* of them, concerning the Power of the Magiſtrates and Dean of Guild, a ſhort Argument may ſuffice.

The Memorialiſts apprehend it to be a fixed Principle equally of Law and of Reaſon, That, in every Society and incorporated Body of Men, the Preſervation of the aſſociated Body muſt be paramount and ſuperior to the ſeparate Utilities of any of the Members. And, 2*dly*, That, in every ſuch Aſſociation, there muſt be lodged ſomewhere, a Power of taking proper Meaſures for the Preſervation of the whole, although theſe Meaſures ſhould reſtrain Individuals from ſo free an Uſe of their Property as they would have in caſe no ſuch Aſſociation ſubſiſted. Theſe Principles are inherent in the Nature of Societies, and cannot be ſeparated from it. It may indeed be obſerved, that where a leſſer Society is Part of a greater, as Boroughs or Communities are Parts of a Nation, there the leſſer Societies are ſubordinate to the Utilities, Laws and Regulations of the greater, in the ſame Manner as Individuals are ſubordinate to them. But, in every Caſe where the Laws or Intereſts of the Nation do not interfere, and expreſsly reſtrain, there is inherent in the Nature of every leſſer Community, a Power of taking proper Meaſures for their own Preſervation, as much as if that Community had no Superior whatever. If theſe Principles are not admitted, human Society would ſoon be at an End. To apply them to the preſent Caſe: Boroughs-Royal are leſſer Communities within the great Community of the Nation; and they have not only many expreſs Privileges from our Acts of Parliament, but, from their very Nature of being Communities, they have, in all Caſes where the public Laws do not reſtrain them, inherent Powers for their own Preſervation. We do not ſpeak merely of the Utility of ſuch Boroughs; we ſpeak of their Preſervation from Deſtruction: And therefore the Memorialiſts apprehend they are rather admitting too much; for ſo ſtrong is the Principle of Self-preſervation, that even Individuals have it, almoſt without regard of any ſuperior Right whatever. Much more then muſt theſe Powers be competent to Communities; and they muſt lie in the Hands of the Magiſtrates and Dean of Guild.

Guild. In reference to theſe Powers, we have many Acts declaratory of Juriſdiction to the Dean of Guild and Magiſtrates, appointing Buildings to be executed by the Dean of Guild's Jedge and Warrant, and ruinous Houſes to be rebuilt by the Magiſtrates, where the Proprietors will not rebuild them. All theſe and many other Acts are declaratory of the Nature of the Dean of Guild's Office, and give the Magiſtrates and him particular Directions and Powers in the Caſes therein mentioned: And though none of them relate to the Caſe now under your Lordſhips Conſideration, yet, by ſhewing the Nature of the Dean of Guild's Office, they plainly point out what muſt be inherent in it, where the Law does not expreſsly regulate and reſtrain. But Cuſtom, the beſt Lawgiver, has not left this to mere Inference or Implication. Do we not ſee, in every Inſtance when a Fire happens, that the Magiſtrates order the neighbouring Houſes to be pulled down, and razed, to prevent the ſpreading of the Fire? Do they wait an Act of Parliament, or even a regular Order of Council for this? By no means. They are warranted by the Principle of Self-preſervation, to order the Houſe to be immediately razed, and that without Reparation or Damage to the Owner. Even when the Danger is not urgent, and when it is only to be ſtrongly apprehended, we have many Inſtances where the Magiſtrates and Dean of Guild, or, upon their Refuſal, your Lordſhips, have taken deliberate Steps, not merely for the Preſervation of the whole Borough, but have alſo limited Individuals in the Uſe of their Property, for the ſake of a ſmall adjoining Neighbourhood; and that even when the Queſtion was not *Preſervation*, but *Quiet* only. The Memorialiſts will mention Inſtances of each of theſe. The firſt is, that of Candlemakers, whom the Magiſtrates and Dean of Guild, by their own proper Authority, do conſtantly reſtrain from uſing their Trade in the Neighbourhood of any other Houſe whatever. The other Inſtances were in private Caſes. In *February* 1750, the Dean of Guild, upon Petition from *Robert Fleming* Printer, removed a Fencing-maſter in his Neighbourhood, becauſe of his Noiſe; and the Cauſe being brought before your Lordſhips, by

Suſpenſion,

Suſpenſion, you refuſed the Bill. Another Inſtance was ſo late as the 1755. One *David Robertſon*, a Blackſmith in *Niddry*'s Wynd, kept a Forge entirely within his own Tenement. Mr *Kinloch* of *Gilmerton*, Proprietor of a neighbouring Tenement in *Kinloch*'s Cloſe, gave in a Petition to the Dean of Guild of *Edinburgh* and his Council, praying, that the Forge might be removed. But the Dean of Guild, after a Viſitation, "found, "That as the Smith's Forge complained of, is placed in th- "Top of a Pend, and within the Tenement which wholly bee "longs to the Defender's Landlord, and is ſet to the Defender "for carrying on his Trade, the Complainer cannot juſtly ob- "ſtruct the ſame; as it does not appear, that the mutual Gavel "betwixt the ſaid Tenements is any wiſe hurt or prejudged by "beating on the ſaid Forge: But found, that the ſaid mutual "Gavel is wet, and probably by Water that comes from a "Spout belonging to the Complainer, which ought to be clean- "ed and repaired, by laying it over with Lead, at his own Ex- "pence." This Caſe came before your Lordſhips by Advocation: A Proof was taken; and although it appeared upon the Proof, that the Forge actually ſtood upon a Pend, and that Mr *Robertſon* kept his Coals in Boxes, which prevented any of the Water with which he moiſtened them from touching the mutual Gavel, and that the Space between the Boxes and the mutual Gavel was quite dry; yet, becauſe it was proved that the Noiſe of the Hammers was heard, and the Smell of the Smiddy-water was felt in the Neighbourhood; therefore your Lordſhips *ordained the Forge to be removed.* Theſe are ſtrong and deliberate Inſtances, to ſhow the Power of the Magiſtrates and Dean of Guild in Matters of this kind; others might be given, and probably will occur to your Lordſhips, all tending to ſhow, that not only for the Preſervation, but even for the Quiet and good Neighbourhood of the Inhabitants of this City, the Magiſtrates and Dean of Guild may, without the Interpoſition of the Legiſlature, limit Individuals in the Uſe of their Property, and not only prevent, but even remove all public Nuiſances whatever.

July 25. 1753.

The

The Memorialiſts ſhall therefore proceed to the *ſecond* Point, namely, Whether, in the preſent Caſe, the Nuiſance be ſo great, and the Danger ſo much to be apprehended, as to require the Interpoſition of public Authority? And, by way of Introduction, it will be neceſſary ſhortly to mention, that, in the Year 1724, Mr *Reoch*'s Father purchaſed, for 2700 Merks, the Tenement and Area in queſtion, from *Thomas Kincaid*, Proprietor thereof; whoſe Diſpoſition deſcribes it, " all and haill that " Ground-ſtory, conſiſting of five Fire-rooms, from South to " North, with Entrance to the Weſt of the ſaid Rooms; with " a To-fall to the Eaſt Side of the ſaid Houſe lately built by " me, conſiſting of twenty-two Foot in length, from South to " North, including the Thickneſs of the North and South " Walls, and fourteen Feet four Inches from Weſt to Eaſt, " including the Thickneſs of the Eaſt Wall; together *with an* " *Yard for holding of Timber at the North Gavel of the ſaid Houſe,* " *the Breadth of the Houſe and To-fall to the South, with an* " *Workhouſe two Stories high at the North End of the ſaid Yard*; " the ſaid Yard and Workhouſe, conſiſting of ſixty-five Feet " and an half, from South to North, on the Eaſt Side; ſixty-" ſeven Feet, from South to North, on the Weſt Side; and thirty " Feet and an half, from Eaſt to Weſt, on the North End thereof, all without the Walls, the Workhouſe included; together alſo with an Piece of waſte Ground and covered Conveniency for holding of Coals to the South of the Entry to the " ſaid Houſe, all bounded, *&c.* as mentioned in the Diſpoſition; *declaring always, likeas it is hereby provided and declared,* " *That it ſhall not be leiſome and lawful to the ſaid* William Reoch, " *and his foreſaids, to build in the ſaid Yard above diſponed any* " *higher than the Dikes are at preſent*, (which was then no " higher than betwixt ſeven and eight Feet), *or to raiſe the Roof* " *of the ſaid Workhouſe in the Yard any higher than it is at preſent*; " *and that he ſhall ſtrike out no more Windows to the North than* " *are at preſent in the ſaid Houſe, and which are at preſent, ſhall* " *be cloſe glaſſed and tirleſſed, or ſtanchioned*; *and that the Back-*

Dec. 29.

" *door of the Shop be turned into an Window, and tirleſſed and ſtan-*
" *chioned*," &c.

This Servitude, a Circumſtance which will have its Weight in this Cauſe, as it was calculated, particularly in the latter Part, for preventing Fire, Mr *Kincaid* thought material to be conceived in the moſt general Terms, for the Benefit of his other remaining Property in *Carrubber*'s Cloſe; for he was at that Time Proprietor, not only of Mrs *Lawſon*'s Houſe, and other Houſes Southward of the Subjects ſold to Mr *Reoch*, but alſo of the whole Area and Tenements at the Bottom of *Carrubber*'s Cloſe, to the Eaſt and North of Mr *Reoch*'s Tenement, which are now the Property of ſundry of the Complainers, who therefore have Right to the Servitude above ſet forth. But Mr *Reoch*, regardleſs of this Servitude, ſome Years ago, not only enlarged his Wright-ſhop to the whole Length of the Timber-yard, but alſo raiſed a great Part of the ſaid Walls about twenty Feet higher than he was allowed by the Servitude, which was the Height of the Walls of the former Shop; and he came quite cloſe to the North Gavel of Mr *Foggo*'s Land, by which means the Fire was communicated to it, and the other Lands burnt down; which might not have been the Caſe, had the Shop remained in its original Situation. This Encroachment was often ſpoken of by many of the Memorialiſts, who feared the Event that afterwards happened; but ſome of them were ignorant of the Servitude, others were tender of hindering a Neighbour from extending his Trade.

But there was another Thing done by him, which greatly increaſed the Danger, and which all the Complainers were ignorant of, till it came out in the Precognition taken by the Magiſtrates ſince the Fire happened, when they were making Inquiry how it began. It was mentioned by one of Mr *Reoch*'s Apprentices, but was not taken down. The Fact is, according to the Memorialiſts Information, That for ſeveral Years paſt Mr *Reoch* has kept in his Workhouſe a Kiln, in which he burnt Plaiſter for grinding of Glaſs. This Kiln was immediately under his Shop, where he had great Quantities of Wood and Shavings;

Combuſtibles

Combuſtibles the moſt eaſily kindled. In this Kiln he often kept Fire the whole Week through, Day and Night, *Sundays* not excepted, when there was no Perſon to watch the Fire; and his own Apprentices, and others, were often alarmed by Sparks from the Top of the Chimney-vent. On thoſe Occaſions his Apprentices have gone to ſee whether the Shop was actually on Fire. This the Memorialiſts, if neceſſary, will be able to prove. And theſe Sparks of Fire oftentimes coming from his Vent, which had a Timber-ſpout on the Top, and which has been obſerved frequently on Fire, gave many of the Memorialiſts, who are within Sight of this Workhouſe, and who feared the Conſequence of the Spout falling down among his Combuſtibles after it was kindled, much Apprehenſion and Diſquiet; and their general Fears appear to have been too well grounded.

It was upon *Saturday* the 12th of *Auguſt* laſt, betwixt Nine and Ten in the Morning, that the Fire firſt appeared in Mr *Reoch*'s Workhouſe. The Quantity of Combuſtibles made it ſpread ſo faſt, that though by divine Providence there was no Wind, yet was it immediately communicated to *Foggo*'s Land on the South; which it more properly ſeemed to devour, than to burn; ſo rapid was the Progreſs it made. The firſt Notice that ſome had of it, who were not yet got out of Bed, was by the Flames breaking into their Bed-chambers. Then began the Confuſion. Fear and Conſternation were in every Countenance; *ſed facies non una timoris*: The Men running up and down, to ſave themſelves, their Families, and Effects; the Women and Children ſcreaming with Terror, lamenting and deſpairing: Some carrying out in Blankets their ſick Relations, who were in Fevers, and other Diſeaſes: The Stairs and Paſſages crouded with People, and filled with Smoke: The Sick and Infirm ſticking there almoſt ſuffocated, under the Terror of being burnt alive; and, in the mean time, bruiſed and trampled upon by others making their Eſcape, who paid no Regard to Age, Sex, or Condition. And ſuch were the Effects of extreme Fear upon ſome, that they became ſtupid, and were unable to make their Eſcape, till they were aſſiſted by others. By

the Bleſſing of Providence, none were actually killed on the Spot; but ſeverals, particularly Firemen, and others, who were moſt active in attempting to extinguiſh the Flames, were cruelly maimed and hurt; and ſome died of the Conſequences.

But it is needleſs to ſet before your Lordſhips Eyes any particular Inſtances of this dreadful Calamity. You can more eaſily figure them, than they can be expreſſed in Words. Let it ſuffice to mention, that there were about *twenty Families*, who had their Houſes either burnt, or pulled down, to hinder the Flames from laying hold on the neighbouring Buildings. All of theſe loſt moſt part of their Furniture and valuable Effects, and many were reduced to abſolute Beggary. Beſides actual Sufferers, there were above *Two hundred* other Families in the neighbouring Cloſes and Street, who had their Furniture to remove, Part of which was loſt or ſtolen in the Confuſion. It was already obſerved, that this Fire happened in the Day-time, and when there was not a Breath of Wind ſtirring: A ſingular Bleſſing from divine Providence! For what muſt have been the Caſe, had this Fire happened in the Night-time, or had there been any Wind from the North-eaſt or Weſt? In that Caſe, the Conſequences might have been the Deſtruction of this whole City. What the Complainers have ſuffered, or were in Danger of ſuffering, will plead their Apology for the ſtrong Impreſſions which your Lordſhips perceive it has made upon them. And theſe Impreſſions have not the leſs Effect, that this is not the only Inſtance where this City has been in Danger from Fires in Wrights Shops. In the Year 1701, a Fire broke out in a Wright's Shop on the North Side of the *Lawn-market*: Aud although it began betwixt Nine and Ten in the Forenoon, yet ſeveral Perſons were burnt to Death in their Houſes, not having Time to eſcape: ſo violent were the Flames. And within theſe eight Years laſt paſt, there has been no leſs than three other Wrights Shops burnt in this City, beſides Mr *Reoch*'s. And the Memorialiſts have Reaſon to believe, though they do not incline to tire your Lordſhips with Inſtances, that many more could be given of the great Fires in this City, which have been kindled in Wrights Shops.

So

So that there can remain little Doubt with your Lordſhips, upon the *ſecond* Point ſtated for your Conſideration, That a Wright's Shop, ſo ſituated as Mr *Reoch*'s, eſpecially if it has a Kiln in it, is ſuch an Nuiſance, and gives ſuch reaſonable Apprehenſion of Danger, as both warrants and requires the Interpoſition of the Power of the Magiſtrates to prevent its being rebuilt. It is the Apprehenſion of Fire alone which makes the Magiſtrates, in all Caſes, prevent Candlemakers from uſing their Trade within the City, or where there are other Houſes contiguous; although the Memorialiſts are not informed of any actual Damage by Fire that was ever done by Candlemakers Shops, ſo as to give Riſe to this Regulation. Wrights Shops being then as dangerous, ſhould evidently ſubmit to a like Regulation. The Wrights, who are a numerous and rich Society in this City, will, it is hoped, from the many fatal Inſtances that have happened, ſee it their own Intereſt to have ſome general Regulation made, and uſe their Influence in the Council to be put upon the ſame ſenſible Footing with the Candlemakers. This ſeems to be particularly neceſſary by the Form of the Buildings in this Town, which may be ſaid to conſiſt wholly of two or three great Houſes; ſo cloſely are the Buildings joined to one another. But whatever the Wrights ſhall do in this, your Lordſhips will no doubt determine according to Juſtice in the particular Caſes that come before you. This leads to a particular Obſervation, which belongs to the Caſe now in iſſue, and which deſerves Attention. The preſent Queſtion is not concerning a general Regulation, to remove all the Wrights Shops out of the City, which perhaps might require a Report of the Circumſtances and Situation of each of theſe Workhouſes. It is not even concerning the removing a Wright's Shop actually ſtanding and made uſe of, where the Poſſeſſor's Damage by removing might be conſiderable; but the preſent Queſtion is only for preventing a Wright's Shop and Workhouſe, which no Man poſſeſſes, which does not even now exiſt, from being again rebuilt, and again poſſeſſed as it was before, leſt the like fatal Accident may again happen. Your Lordſhips will ſee from the Plan herewith produced, that it is in Contact with the Tenements which were burnt down; that

that it is within twelve or fourteen Feet of ſome of the Houſes all around at the Bottom, and on the other Side of the Cloſe; ſo that the Wind cannot blow from any one Point of the Compaſs, but Fire kindled in that Workhouſe muſt be communicated to the neighbouring Houſes, and ſo probably to one half of the Town. It is hardly material here to take notice of what Mr *Reoch* ſays in his Anſwers to the Bill of Advocation concerning Mr *Butter*'s Wright-ſhop, which is above 100 Feet North from the new Land, and which has no Houſes to the North or Eaſt within ſeveral hundred Yards, and is only touched on the Weſt by Mr *Butter*'s own Houſe; ſo that there is leſs Danger from this Shop of Mr *Butter*'s, than from any other Wright's Shop in Town. But ſuppoſing it were otherwiſe, it does not affect the general Argument, but rather ſupports it, as adding to the Apprehenſion of general Danger.

The Memorialiſts think it alſo improper to enter into any Diſcuſſion concerning the ſmall Difference, as Matters now ſtand, that it muſt make to Mr *Reoch*, whether he converts this Area to the former Uſe, or to any other. It muſt evidently be much leſs than if this were a Workhouſe ready built, fitted up and poſſeſſed by a Tradeſman; and the Memorialiſts are informed, that Mr *Reoch* has been offered for the bare Area of his Shop and Workhouſe, about two thirds of what the Houſes, Shop, and Area, coſt him altogether. So that his Loſs upon that Article will not be great. As to his Timber and made Work, and other Things, the Memorialiſts much regret his Loſs. But ſurely it cannot be imputed to any want of Concern for him, that they are anxious to prevent what might occaſion a Repetition of the like Loſs to him, as well as others. This they owe to themſelves, and to the Compaſſion they have for the many miſerable Sufferers who have been reduced to a State of Beggary by the Fire; which will alſo plead an Apology with your Lordſhips for the great Length of this Paper. And they humbly hope they have ſaid what will ſatisfy your Lordſhips, both of the Power of the Dean of Guild and Magiſtrates, and of the great Neceſſity there is for interpoſing it on this Occaſion.

In reſpect whereof, &c.

JOHN SWINTON *junior*.